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**Message:** SERIAL 09/631,224 APPEAL BRIEF

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Atty. Docket No. GB920000047US1

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re application of: Stevens, A.  
Serial No.: 09/631,224  
Filed: August 2, 2000  
For: Performance Profiling Tool  
Art Unit: 2126

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**CERTIFICATION OF FACSIMILE TRANSMISSION**

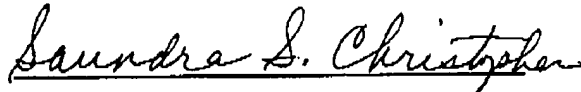
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1. Transmittal of Appeal Brief (in duplicate)
2. Appeal Brief (15 pages)

Date: December 19, 2005

Saundra S. Christopher      919-543-5845

(Name of person signing certification)



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DEC 19 2005

Docket No. GB920000047US1

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re application of: Stevens, A.

Serial No.: 09/631,224

Filed: August 2, 2000

Group No.: 2126

Examiner: Ho, Andy

For: Performance Profiling Tool

To: Commissioner of Patents  
P. O. Box 1450  
Alexandria, VA 22313-1450

**TRANSMITTAL OF APPEAL BRIEF  
(PATENT APPLICATION-37 CFR 192)**

Sir:

Transmitted herewith is the APPEAL BRIEF in this application with respect to the  
Official Action Mailed on

**1. STATUS OF APPLICATION**

This application is on behalf of

  X   other than a small entity

       small entity  
verified statement:        attached        already filed

**2. FEE FOR FILING APPEAL BRIEF**

Pursuant to 37 CFR 1.17(f) the fee for filing the Appeal Brief is:

       Small entity \$

  X   Other than a small entity \$500.00

Appeal Brief fee due   \$500.00

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## 3. TOTAL FEE DUE

The total fee due is:

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  X   Charge Account No. 09-0461 the sum of \$500.00  
(a duplicate of this transmittal is attached)

## 5. FEE DEFICIENCY

  X   If any additional extension and/or fee is required, this is a request therefor and to charge Account No. 09-0461.

  X   If any additional fee for claims is required, charge Account No. 09-0461.

  
Gerald R. Woods

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**In the United States Patent and Trademark Office**

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**Date:** December 19, 2005**In re Application of:** Alan P. Stevens**Filed:** August 2, 2000**For:** Performance Profiling Tool**Serial Number:** 09/631,224**Art Unit:** 2126**Examiner:** Ho, Andy**Appellant's Brief**

Hon. Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

**A. INTRODUCTORY COMMENTS**

This brief is filed in support of the Notice of Appeal filed in this case on October 17, 2005. The appeal is from the final rejection of claims of claims 1 and 22-25 in an action mailed June 21, 2005. Please charge the required fee under 37 CFR 41.20(b)(2) to IBM Corporation Deposit Account No. 09-0461.

The two-month deadline for filing this Appeal Brief is nominally December 17, 2005. Since December 17 was on a Saturday, this Appeal Brief is considered timely filed today so that no extension of time is necessary. If, however, an extension of time is required, the extension is requested and the undersigned authorizes the Commission to charge any required fees to IBM Corporation Deposit Account No. 09-0461.

**B. REAL PARTY IN INTEREST**09/631,224 (*Appeal Brief*)

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The real party in interest in this appeal is International Business Machines Corporation, which is the assignee of the entire right, title and interest in the above-identified patent application.

**C. RELATED APPEALS AND INTERFERENCES**

There are no other known prior or pending appeals, interferences, or judicial proceedings that are related to, will directly affect, be directly affected by, or have a bearing on the Board's decision in the pending appeal.

**D. STATUS OF CLAIMS**

*1. Total number of claims in application*

*There are five claims pending. All five are independent claims.*

*2. Status of all claims in application*

*Claims canceled: 2 - 21*

*Claims withdrawn from consideration but not canceled: None*

*Claims pending: 1, 22 - 25*

*Claims allowed: None*

*Claims rejected: 1 - 25*

*3. Claims on appeal*

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*The claims on appeal are 1 and 22 - 25.*

**E. STATUS OF AMENDMENTS**

All amendments have been entered. No amendments were submitted after the final rejection of the claims.

**F. SUMMARY OF CLAIMED SUBJECT MATTER**

Each of the five claims on appeal is an independent claim. Claims 1, 22 and 23 are directed to apparatus for providing application execution data to a profiling agent on a remote system as requested by the agent. Claims 24 and 25 are directed to a method for providing application execution data to a profiling agent on a remote system as requested by the agent.

As claimed in claims 1 and 24, Appellant claims an apparatus and method for providing application execution data to a profiling agent on a remote system at the request of the agent. The application that generates the application execution data (see Figure 4, reference numeral 320, page 17, lines 6-10) is local to the apparatus. The apparatus includes means for receiving a request for the application execution data via a network interface (Figure 4, reference numerals 11a and 350, page 17, lines 13-21) and means responsive to the received request for requesting the data from the application via a local interface (Figure 4, reference numerals 11b and 360, page 17, line 23 - page 18, line 2). The apparatus further includes means for receiving the requested execution data via the local interface (Figure 4, reference numeral 13, page 18, lines 4 - 19) and for passing the data on to the profiling agent via the network interface (Figure 4, reference numerals 14a, 14b and 15, page 18, line 17 - page 21, line 4). The network interface exposes all of the functionality of the local interface to the profiling agent and allows receipt of controls from the profiling agent for controlling the apparatus (page 12, line 26 - page 16, line 3).

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One of the received controls selectively switches between synchronous and asynchronous transmission of application execution data to the profiling agent (page 12, line 21 - page 15, line 15).

Method claim 24 recites a method of using the apparatus claimed in claim 1. The method steps are generally described on page 21, line 20 – page 35, line 4 with reference to Figures 5 and 6.

As claimed in claims 2 and 25, Appellant claims an apparatus and method for providing application execution data to a profiling agent on a remote system at the request of the agent. The application that generates the application execution data (see Figure 4, reference numeral 320, page 17, lines 6-10) is local to the apparatus. The apparatus includes means for receiving a request for the application execution data via a network interface (Figure 4, reference numerals 11a and 350, page 17, lines 13-21) and means responsive to the received request for requesting the data from the application via a local interface (Figure 4, reference numerals 11b and 360, page 17, line 23 - page 18, line 2). The apparatus further includes means for receiving the requested execution data via the local interface (Figure 4, reference numeral 13, page 18, lines 4 - 19) and for passing the data on to the profiling agent via the network interface (Figure 4, reference numerals 14a, 14b and 15, page 18, line 17 - page 21, line 4). The network interface exposes all of the functionality of the local interface to the profiling agent and allows receipt of controls from the profiling agent for controlling the apparatus (page 12, line 26 - page 16, line 3) over a first connection and the transmission of application execution data to the profiling agent over a second connection (Figure 4, reference numeral and 15).

Method claim 25 recites a method of using the apparatus claimed in claim 22. The method steps are generally described on page 21, line 20 – page 35, line 4 with reference to Figures 5 and 6.

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As claimed in claims 23, Appellant claims an apparatus for providing application execution data to a profiling agent on a remote system at the request of the agent. The application that generates the application execution data (see Figure 4, reference numeral 320, page 17, lines 6-10) is local to the apparatus. The apparatus includes means for receiving a request for the application execution data via a network interface (Figure 4, reference numerals 11a and 350, page 17, lines 13-21) and means responsive to the received request for requesting the data from the application via a local interface (Figure 4, reference numerals 11b and 360, page 17, line 23 - page 18, line 2). The apparatus further includes means for receiving the requested execution data via the local interface (Figure 4, reference numeral 13, page 18, lines 4 - 19) and for passing the data on to the profiling agent via the network interface (Figure 4, reference numerals 14a, 14b and 15, page 18, line 17 - page 21, line 4). The apparatus also includes a buffer (Figure 4, reference numeral 355, page 18, lines 4-12) for storing application execution data defining events, at least one of which is synchronous. (page 18, line 14 - page 20, line 2) and means responsive to receipt of a synchronous event for switching to synchronous transmission of the application execution data (page 19, line 17 - page 20, line 2).

Claims 1, 23 and 24 are considered to be part of one group. Claims 22 and 25 are part of a second group.

**G. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

Claims 1 and 24 stand rejected under 35 USC 103(a) as being obvious over Klemm U.S. Patent No. 6,457,142 in view of Guthrie U.S. Patent No. 6,385,661, and further in view of Doucette U.S. Patent No. 6,356,559.

Claims 22 and 25 stand rejected under 35 USC 103(a) as being obvious over Klemm in view of Guthrie, and further in view of Benson, U.S. Patent No. 6,202,085.

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Claim 23 stands rejected under 35 USC 103(a) as being obvious over Klemm U.S. in view of Guthrie and further in view of Swenson U.S. Patent No. 6,574,675.

#### **H. ARGUMENTS**

**1. The rejection of claims 1 and 24 is improper as there is no reasonable basis for combining the teachings of the cited references.**

As the Board well knows, the MPEP (Section 2141) expresses basic considerations which apply to obviousness rejections involving multiple references:

- a) The claimed invention must be considered as a whole;
- b) The references must be considered as a whole and must suggest the desirability and thus the obviousness of making the combination;
- c) The references must be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention; and
- d) A reasonable expectation of success is the standard with which obviousness is determined.

In all of the Office actions relevant to this application, it is acknowledged by the Examiner that the Klemm patent does not teach switching between synchronous and transmission of data, an essential element of claims 1 and 24. In a non-final action, an attempt was made to remedy this admitted deficiency of Klemm through the citation of the Doucette patent. In responding to that action, it was pointed out that the Klemm environment and the Doucette environment are so radically different that one of ordinary skill in the art would not only not think of trying to graft the synchronous/asynchronous capabilities of Doucette onto Klemm but would almost certainly not know how to accomplish it if that inventor even thought about it.

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Klemm describes a point-to-point environment where the two end points of a connection establish synchronous or asynchronous modes of operation to control the exchange of data between the end points. Doucette describes a ring architecture environment in which both synchronous and asynchronous data is passed from one module to the next in the ring in a single direction. Tokens are passed from one module to the next along the ring to permit the changes between synchronous and asynchronous modes of data passing.

Given the difference in environments, it is clear that the Klemm and Doucette references are not being considered as a whole, as required by the MPEP. It is further clear that there is nothing in either reference that suggests the desirability of attempting to combine such disparate technologies. There is simply no logical basis for attempting to engraft the synchronous/asynchronous capabilities of Doucette onto Klemm.

The final Action attempted to overcome the deficiencies of Klemm and Doucette by throwing Guthrie into the mix. The problem with that attempt is that Guthrie, like Klemm, describes a point-to-point system and contains nothing that suggests why it would have been desirable to one of ordinary skill in the art to meld the components of a point-to-point system as taught by Klemm and Guthrie with the components of a ring system as taught by Doucette.

**2. Even if it were appropriate to engraft the teachings of Guthrie onto Klemm somehow, the end result would still not be the invention defined by claims 1 and 24.**

But even if it is assumed that one of ordinary skill in the art would see some reason to combine the teachings of Klemm, Guthrie and Doucette, the end result would still not be the inventions defined by claims 1 and 24. Those claims define an apparatus/method in which controls are received from a profiling agent on a remote system. A response to one of those

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controls is to selectively switch between synchronous and asynchronous transmission of application execution data to a profiling agent.

None of the cited references shows selective switching between types of data based on a control received from a remote profiling agent. Doucette mentions transmission of synchronous and asynchronous data packets but does not teach or suggest selectively switching between different types of data packets based on controls received from a remote system.

What Doucette does show is that both synchronous and asynchronous data packets can be transmitted in different parts of a window that remains open long enough to assure that all pending synchronous data packets are transmitted in the "front end" of the window. Once all pending synchronous data packets are included in the window's front end, any slots open at the back end of the same window can be used for the transport of asynchronous data packets.

In Doucette, a switch between sending of synchronous data packets and asynchronous data packets does not happen because a control is received from a remote profiling agent. It happens because the sending system runs out of synchronous data packets to send and can begin to accommodate asynchronous data packets.

Thus, even if a hypothetical combination of Klemm, Doucette and Guthrie were appropriate, which it isn't for the reasons noted above, that combination would still not be the inventions defined by claims 1 and 24.

**3. The rejection of claim 23 is improper as there is no reasonable basis for combining the teachings of the cited references. If the teachings are nevertheless combined, the end result is not the apparatus defined by the claim.**

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Claim 23 is similar to claim 1 in many respects. Instead of reciting the switching between synchronous and asynchronous transmission of application execution data in response to receipt of a control, however, claim 23 recites a buffer for storing application execution data prior to transmission and means responsive to receipt of a synchronous event for switching to synchronous transmission of application execution data.

Claim 23 stands rejected over Klemm in view of Doucette in further view of Swenson. This brief discusses above why the purported combination of Klemm and Doucette fails to meet the requirements of MPEP Section 2141. That discussion will not be repeated here.

The Swenson patent is not cited as supposedly overcoming the deficiency of the proposed combination, which it does not. It is cited for teaching a synchronous communication interface and supposedly switching to that interface when a synchronous event is received. Nothing could be found in claim that appears to teach switching to a synchronous communication interface since there is no other interface to be switched from.

Doucette already, according the Final action, already teaches a synchronous interface and there is no apparent reason why it might be considered to add the synchronous interface taught by Swenson to the existing synchronous interface of Doucette.

**4. The rejection of claims 22 and 25 is improper. Even if the cited references are combined as proposed in the Final action, the end results are not the inventions defined by the claims.**

Claims 22 and 25 are similar to claims 1 and 24, respectively, in many respects. Instead of reciting the switching between synchronous and asynchronous transmission of application execution data in response to receipt of a control, however, claim 22 recites that controls are

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transmitted to the apparatus over a first connection and to the profiling agent over a second connection.

Claim 22 and 25 stand rejected over Klemm in view of Doucette in further view of Benson. This brief discusses above why the purported combination of Klemm and Doucette fails to meet the requirements of MPEP Section 2141. That discussion will not be repeated here.

Benson is cited for supposedly showing the use of two different connections to transport controls and application execution data. The Office action specifically mentions connections 36 and 57 in the Benson patent.

Connections 36 and 57 both carry data in the same direction; that is, toward a collector/data collector component. These two connections clearly cannot satisfy the requirement of the claims that controls flow on one connection toward an application being profiled while application execution data flows on a second connection from the application being profiled.

**Conclusion**

For the reasons stated above, it is respectfully submitted that claims 1 and 22-25 are not obvious over the hypothetical combination of Klemm and Doucette with any of Guthrie, Swenson and Benson and are allowable as presently written. Reversal of the final rejections is respectfully requested.

Respectfully Submitted,



Gerald R. Woods, Reg. No. 24,144

***PATENT***  
***IBM Docket No. GB9-2000-0047US1***

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**I. APPENDIX OF CLAIMS**

1. Apparatus for providing application execution data to a profiling agent on a remote system as requested by said agent, wherein a first application local to said apparatus generates said application execution data, said apparatus comprising:

means for receiving a request via a network interface from said profiling agent for said application execution data;

means, responsive to said request, for requesting said application execution data from said first application via a local interface;

means for receiving said application execution data from the first application via said local interface; and

means, responsive to receipt of said application execution data, for transmitting said application execution data to the profiling agent via said network interface,

wherein said network interface exposes substantially all the functionality of the local interface to said profiling agent and allows receipt of controls from said profiling agent for controlling the operation of said apparatus, at least one of said controls providing for selectively switching between synchronous and asynchronous transmission of said application execution data to said profiling agent.

22. Apparatus for providing application execution data to a profiling agent on a remote system as requested by said agent, wherein a first application local to said apparatus generates said application execution data, said apparatus comprising:

means for receiving a request via a network interface from said profiling agent for said application execution data;

means, responsive to said request, for requesting said application execution data from said first application via a local interface;

means for receiving said application execution data from the first application via said local interface; and

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means, responsive to receipt of said application execution data, for transmitting said application execution data to the profiling agent via said network interface,

wherein said network interface exposes substantially all the functionality of the local interface to said profiling agent and allows receipt of controls from said profiling agent for controlling the operation of said apparatus, said controls being transmitted to said apparatus over a first connection, and said application execution data being transmitted to said profiling agent over a second connection.

23. Apparatus for providing application execution data to a profiling agent on a remote system as requested by said agent, wherein a first application local to said apparatus generates said application execution data, said apparatus comprising:

means for receiving a request via a network interface from said profiling agent for said application execution data, said application execution data comprising events;

means, responsive to said request, for requesting said application execution data from said first application via a local interface;

means for receiving said application execution data from the first application via said local interface;

means, responsive to receipt of said application execution data, for transmitting said application execution data to the profiling agent via said network interface;

a buffer for storing said application execution data prior to transmission to said profiling agent and each event stored in said buffer includes a timestamp, at least one of said events being specified as synchronous; and

means responsive to receipt of a synchronous event for switching to synchronous transmission of said application execution data.

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24. A method for providing application execution data to a profiling agent on a remote system as requested by said agent, wherein a first application generates said application execution data, said method comprising the steps of:

receiving a request at an apparatus via a network interface from said profiling agent for said application execution data;

responsive to said request, requesting said application execution data from said first application via a local interface;

receiving said application execution data at said apparatus from the first application via said local interface; and

responsive to receipt of said application execution data at said apparatus, transmitting said application execution data to the profiling agent via said network interface; said network interface exposing substantially all the functionality of the local interface to a profiling agent on a remote system,

receiving controls from the profiling agent for controlling execution of the application; and,

responsive to receipt of at least one of said controls, selectively switching between synchronous and asynchronous transmission of said application execution data to the profiling agent.

25. A method for providing application execution data to a profiling agent on a remote system as requested by said agent, wherein a first application generates said application execution data, said method comprising the steps of:

receiving a request at an apparatus via a network interface from said profiling agent for said application execution data;

responsive to said request, requesting said application execution data from said first application via a local interface;

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receiving said application execution data at said apparatus from the first application via said local interface; and

responsive to receipt of said application execution data at said apparatus, transmitting said application execution data to the profiling agent via said network interface; said network interface exposing substantially all the functionality of the local interface to a profiling agent on a remote system;

receiving controls from the profiling agent for controlling execution of the application, said controls being transmitted to the apparatus over a first connection and said application execution data being transmitted to the profiling agent over a second connection.